

Whither the future of law? : concluding remarks

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The Law of the Future and the Future of Law: Volume II

Sam Muller, Stavros Zouridis Morly Frishman and Laura Kistemaker (editors)

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Whither the Future of Law? Concluding Remarks

Jan M. Smits*

This concluding chapter draws a picture of the future of law that is based upon the preceding contributions and upon the views of the author. It identifies three main functions of the law – rule- and decision-making, enforcement, and dispute resolution – and asks how these functions are affected by economic globalisation and technological development. One of the main shifts identified is the one from dispute resolution to dispute avoidance: under the influence of declining national laws, and in the absence of a meaningful global law, private actors turn to alternative mechanisms such as reputational networks to order their relationships.

1. Introduction

In 1930, John Maynard Keynes published a short essay entitled *Economic Possibilities for our Grandchildren*. Perhaps the greatest economist of the twentieth century asked what economic life would be like around 2030. Next to surprisingly accurate predictions about future income levels, it is not too audacious to assume that Keynes will be proved wrong when it comes to his view of future working hours (he predicted a 15-hour working week in 2030) and people's mentality towards money ("the love of money as a possession – as distinguished from the love of money as a means to the enjoyments and realities of life, will be recognised for what it is, a somewhat disgusting morbidity"). The think pieces collected in this volume follow Keynes' example in reflecting upon what the world will look like in the future, but differ in two important respects. First, the contributions relate to the law, arguably to a lesser extent subject to change

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over time than the economy, and second, their horizon is not a hundred years, but only two to three decades. This makes the exercise carried out in this volume not only less speculative than Keynes' work, but also more exciting. It is likely that more than one think piece accurately describes future law.

The aim of this concluding chapter is to draw a picture of the future of law that is partly based upon the preceding contributions, and partly upon my own views of what course the law is likely to take in an age of ever-accelerating globalisation and technological progress. The goal is explicitly not to summarise all of the contributions, or to make reference to all individual authors, but rather to provide the reader with an analysis that cuts through the respective substantive legal fields addressed in this volume. This approach is justified because fields such as intellectual property law, corporate law, environmental law, trade law, competition law, cyberlaw, procedural law, human rights, health law and international law, to name the most important fields discussed in this book, all face identical problems of rule-making, of identifying the right substantive legal norms, of enforcement and of solving conflicts.

This crosscutting approach sets the agenda for this contribution. It identifies three main functions of the law – rule- and decision-making, enforcement, and dispute resolution – and asks in the three following sections not only how these functions are affected by globalisation and technological development, but also what alternatives exist. One can describe this as a functional approach. I assume that the law fulfils certain functions including the three just mentioned, and that one of the main challenges in thinking about the future is how these functions can also be satisfied, whether in a legal or non-legal way, in a globalising and technologically progressing society.

There is one methodological problem that deserves separate attention. The think pieces in this volume focus almost entirely on either finding new solutions in cases where the traditional national rules no longer function properly, as in private international law, where a jurisdictional approach is no longer in line with today's borderless reality, or on identifying a legal solution to a new problem, as in case of whether robots should have human rights obligations. In both cases, the natural tendency of lawyers is to overstress the importance of the law. However, it is likely that the problem-solving power of the law, in essence still largely of national origin, becomes less important in cases where a problem is no long-

er purely national. In case of a truly new problem, it also remains to be seen what the role of the law could be in solving it. Anyone writing about the law of the future should therefore take into account that the law's functions can easily change as a result of changes in society as a whole.

This may well explain why many of the contributions in this volume do not take up the grand societal challenges that the world is facing today. HiiL's *Law Scenarios to 2030* predict a rising population, greater scarcity of food, water and natural resources, including oil and gas, increasing security concerns and exposure to more, and not necessarily better, information. These trends come next to 'older' concerns about continuing rivalry among ethnic and religious groups, failed States, war, mass atrocities, nuclear proliferation, poor enforcement of human rights standards, the ineffectiveness of international law, including the adverse effects of big power politics in the United Nations, and too little attention for social justice. Added to these must be relatively new challenges such as global warming, the global financial crisis, the effects of the Arab Spring on the rights of minorities and on peace in the Middle East, and the changing balance of economic and political power in the world. The authors of the present book leave these challenges, incidentally largely influenced by a Western view of the world, almost completely aside – and probably rightly so. The law can only play a very limited role in addressing them.

2. Rule- and Decision-Making

If anything becomes clear from reading the contributions to this volume, it is that the Westphalian idea of States exclusively setting the norms for the people on their territory is no longer adequate. This is not only true as a description in view of the rise of international norms and of private regulation; it is also true at the normative level. As more and more problems can no longer be appropriately dealt with by national law, they need to be addressed in a different way. There are two fundamentally different ways to do this and both are represented in the present book.

The first alternative is to keep up the hope that what can no longer be done by way of national law, such as norm setting in a legitimate and effective way, could be done in a similar way at the European or global level. This leads to a belief in a global legal order and in the creation of international courts as effectively taking over the role of national judiciaries. This testifies of a continuing belief in the power of law and in official

institutions being able to set rules and govern the world in much the same way as national institutions have done in the last two centuries. A prominent example of such global constitutionalism is Frank Vibert's plea for a coherent system for the judicial review of rule-making by international bodies.

The second alternative is to find functional equivalents outside of the law for the traditional national rules and institutions. This requires a different way of thinking. Instead of claiming that effective rule setting, or any other task of the State such as providing legal certainty or creating a framework for business transactions, should be provided by new international institutions, one seeks the solution in devices that can play a similar role without a need for the State or State-like organisations to intervene. This latter way of reasoning is of course informed by the reality that it is not easy at all to solve problems by way of international law-making. In some fields, such as Corporate Social Responsibility, this second alternative is already very much reality as a result of the activities of private actors. However, in areas that belong even more clearly to the public realm, it is more difficult to leave behind our old conceptions of State-made law, precisely because we feel that in public matters decision-making should take place through broad participation of the citizens or at least of national parliaments. An enlightening example is offered by Albert Lin: global warming might be addressed by geo-engineering technologies that enable us to choose a climate for the planet, but prospects of finding an acceptable answer to the question as to who should 'control the thermostat' are slim.

It would in my view be wrong to argue against the rise of the second alternative. It is the logical consequence of the changing role of law through globalisation. Globalisation requires solutions that national law cannot offer and therefore the vacuum is filled in different ways. However, this is not all. Just as important for the future of law is its potential at the national level. Here too, the role of law is due to change. Edward Rubin rightly observes that "the law of the future will bring the long-overdue demise of [the] pre-modern conception of law". Law as a set of State commands for human conduct will make place for law as an instrument of modern administrative governance, leading to a shift from democratic procedures to results, from generality to particularisation and from regularity to supervision. Rubin thus provides the theoretical framework to

what others see occurring in their respective fields, including banking and corporate law, environmental law and competition law.

An interesting question is whether we can also predict anything about the future substantive course that the law will or should take. Remarkably, most contributions focus on questions of legitimacy, transparency and effectiveness of rule-making and not so much on the substance of future rules. This neutral approach can be easily explained. Any type of global law necessarily reflects diverging views of what is right. Notions of what the rule of law and fundamental rights entail already differ considerably in today's world and it is not likely that this will change in the future. In particular, if the law is to play a role in the process of economic and political development of widely diverging countries, as many contributions at least implicitly assume, it is essential to take this diversity into account. This explains why not many authors are in favour of the outright unification of laws, which presumes a view of only one 'right' substantive rule. Rather, the authors argue for recognition of diversity. As diverse views of what is right are probably best reflected by national laws, this also means that national laws remain important, shifting the question to how to coordinate these laws among each other.

3. Enforcement

The second traditional function of the State is that it facilitates the enforcement of the applicable law. In a Westphalian view, the State has a monopoly on both the drafting of substantive rules and the enforcement of these rules through the national courts. While the first monopoly is rapidly eroding, as we just saw, the second one still largely exists: except for some exceptional cases, of which the various international criminal courts are the most important examples, the enforcement of law is still in the hands of national institutions. This is quite logical. Today's problems may be increasingly global, but our institutions are not. Private actors and other international rule-setters thus still need to rely on the teeth of national courts to enable their addressees to claim their rights.

This age-old jurisdictional approach makes enforcement complicated and therefore expensive, a problem that is felt in particular in cross-border cases. This is true not only for data protection laws, as Lokke Moerel convincingly shows, but also in many other fields including consumer law. It leads businesses to favour private enforcement and private regulation wherever possible and prompts future customers to better as-

sess the risk of default by the other party before even entering into the transaction (see further below, section 4). A crosscutting analysis of the think pieces confirms that litigation in the national courts is usually seen as unproductive, as Martijn Scheltema aptly describes for the field of Corporate Social Responsibility.

This finding also explains why, even in the case of new legislative instruments that allow cross-border collective redress in a national court, most parties still prefer alternatives to litigation. Arbitration and mediation are among these, but they are in the end also dependent on the State courts when it comes to the enforcement of the arbitral award or the mediation agreement. It does therefore not come as a surprise that, in a recent study, Thomas Dietz concludes that a territorially fragmented global legal order, as we have at present with separate State legal systems, is problematic in a global economy. As was already seen when rule-making was discussed, the appropriate remedy can be found in two directions. One could adapt the existing rules of private international law, for example by broadening the international jurisdiction of national courts and by enhancing mutual recognition. As this requires each individual State to change its own laws, this is not likely to happen. The alternative is that practice finds its own ways and seeks to avoid recourse to the law by assessing a party's reputation *ex ante* (see below, section 4).

4. Dispute Resolution and the Shift from *Ex Post* to *Ex Ante*

Many of the contributions could start – and some of them in fact do – with the observation that despite the globalisation of trade, of environmental concerns, of competition among companies, there is no such thing as an effective global trade law, consumer sales law, environmental law or competition law. This absence is felt in particular when it comes to dispute resolution. This is likely to lead to two shifts, the contours of which are already clearly visible today.

First, there is a shift from State courts towards forms of private justice. Private actors not only set rules, but also increasingly take care of the State function of providing access to an effective resolution of disputes. As we saw before, this includes arbitration, mediation and other forms of ADR. If we look at the provision of dispute resolution as a process of competition, in which State courts compete with other providers of problem solving devices, it seems that State courts are in decline. At the same time, State courts do take measures to remain competitive. While Western

jurisdictions try to attract foreign parties to their courts, even issuing brochures, a prominent example being the English Law Society's leaflet, *England and Wales: The Jurisdiction of Choice*, Benjamin Odoki provides a nice example of how technology can help in enabling access to justice for people from distant areas. His vision of virtual courts for Uganda is worth following in many other parts of the world. It reinforces the point made by Maurits Barendrecht that we are in need of more innovative types of civil justice, also to keep State courts competitive.

The second shift is in my view even more important, at least for the area of private law. This is the shift from dispute resolution to dispute avoidance, so from *ex post* to *ex ante* dealing with potential disputes. If national law is no longer in demand and global law does not exist, private actors turn to other mechanisms to order their relationships. It is no surprise that social networks play an important role in this alternative ordering process. David Charny wrote in 1990, "One key to effective reputational controls is a system for transmitting relevant information to market participants. [...] Collective reputational enforcement should work well [...] in markets limited to small numbers, homogenous groups of individuals who are in frequent contact and thus can share relevant information. These markets are, of course, relatively rare. Conversely mass markets based on reputational bonds are feasible only with technology that conveys information cheaply to a large group of transactors [...]"

The most interesting aspect of this view is that what was still impossible in 1990 has become possible today. Due to the rise of the internet, reputational networks need no longer be based on close social contacts. Perfect strangers are often able to assess the reliability of other parties through websites that rank their previous behaviour. If one of the main functions of law is to create trust among people who do not know each other, it may well be that new technologies allow people to replace the law with new types of reputational networks. This fits in with Jim Dator's observation that order does not need law. His point that order can also exist through personal contact, and that law only becomes important in a political society sanctioned by organised force, seems to imply that a global order can exist without law as long as other methods of creating trust are in existence. In my own words, Facebook may be much more important for the future of law than any official statute or treaty.

5. Changing Roles of Legal Actors and the Importance of Legal Education

The functional approach adopted in this contribution sheds some light on how the role of national law, and of law in general, is likely to change in the coming twenty years. All actors involved in the legal process will have to get used to new roles. National legislatures have to accept that they are becoming just one other lawgiver and have to compete with others in setting effective rules for their citizens. Courts are likely to be increasingly called upon to fill the gaps that national legislatures cannot provide rules for. However, probably the most important change will lie in the rise of private actors, private regulation, private enforcement and above all a shift away from the law itself towards reputational networks will fundamentally change the regulatory power of law.

One group of legal actors was not yet mentioned, although their role is vital in addressing the challenges future law faces: law professors. Until now, most law professors have shown only little interest in changing the way in which they teach the law. As long as teaching focuses on learning the (doctrinal) law of national jurisdictions only, students will not grasp any of the trends identified in this collection of think pieces. There is a dire need to teach the law in a different way, not only by paying attention to rules flowing from other sources than the official ones, but also by showing alternative solutions outside of the law. Both Clark Cunningham's and Miguel Maduro's contribution show that the transformation towards such a more societally relevant curriculum is needed and possible.

One final remark is in place. While the effects of globalisation are often lamented, a majority of the contributions to this volume are optimistic about the law of the future. This may be due to the problem-solving approach of lawyers in general: no matter what the problem is, they are trained to find a solution for it. This makes it appropriate to end with a quote by economist Joseph Stiglitz. In his book *Making Globalization Work*, he quotes his wife, asking him "You have complained enough about globalisation. What would you do about it?" This is a question to which lawyers have an answer.

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